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Supreme Court, U.S.
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No. 99-1761

IN THE
Supreme Court of the United States

SANDOZ PHARMACEUTICALS CORPORATION,
now known as Novartis Pharmaceuticals Corporation,
Petitioner,

v.

ANGELA Y. PARNELL, individually and on behalf of her minor son GARRETT PARNELL, and CLINTON PARNELL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

MICHAEL J. THOMAS
FULLER, JOHNSON & FARRELL
111 North Calhoun Street
Tallahassee, FL 32302
(850) 224-4663

JOE G. HOLLINGSWORTH
Counsel of Record
KATHARINE R. LATIMER
MARTIN C. CALHOUN
CYNTHIA L. KENDRICK
SPRIGGS & HOLLINGSWORTH
1350 I Street, NW
Ninth Floor
Washington, D.C. 20005
(202) 898-5800

Counsel for Petitioner

June 5, 2000

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition does not dispute one of the central points of the Novartis Pharmaceuticals Corporation ("NPC") Petition—that it is important for this Court to ensure that federal appellate courts correctly and uniformly construe the scope of their collateral order doctrine jurisdiction. The Respondents ("the Parnells") also do not dispute the importance of the issue presented by NPC's Eleventh Circuit appeal: what legal standard governs when district courts consider discovery requests for confidential settlement agreements reached in other lawsuits. Nor does the Brief in Opposition disagree with NPC's argument that the collateral order doctrine analysis is materially different for appeals that present a pure question of law (as opposed to appeals seeking review of a fact-bound or discretionary ruling).

Instead, the Parnells' argument rests on two premises: (1) that NPC's appeal did not present a pure question of law because the district court already applied the particularized showing standard sought by NPC, *see* Brief in Opp. at 1-4; and (2) that "[a]ll of the Circuits agree that discovery orders are not proper subjects of *Cohen* appeals, even where the order requires a party to disclose sensitive or confidential information such as settlement data," *id.* at 4. As explained below, both contentions are demonstrably incorrect—and neither undermines the conclusion that the Court should grant the Petition to give federal courts and litigants much-needed guidance in how to apply the collateral order doctrine when an appeal of a discovery order presents an important, pure question of law completely separate from the merits of the underlying lawsuit.

I. NPC's Appeal Presented A Pure Question Of Law: Whether The District Court Erred In Applying The Liberal Discovery Standard Of Rule 26(b)(1) Instead Of The More Demanding "Particularized Showing" Standard Sought By NPC.

In an effort to establish that NPC's Eleventh Circuit appeal requires a fact-intensive inquiry at odds with the principles upon which the collateral order doctrine is based, the Parnells claim that the district court did conduct the particularized showing analysis that NPC argues should have been, but was not, conducted. *See* Brief in Opp. at 2-4.[1] They have, however, mischaracterized the court's analysis to fit their argument.

The order at issue, Petition App. 2a-4a, plainly shows that the district court did *not* apply a particularized showing standard, but instead evaluated the Parnells' extraordinary document request only by the more liberal standard of Federal Rule of Civil Procedure 26(b)(1). The court began its analysis of this issue by stating that "settlement agreements which contain confidentiality provisions are subject *merely* to Rule 26(b)(1)," Petition App. 3a (emphasis added), and went on to quote the rule itself. The subsequent paragraph—which the Parnells quote to support their contention that the court applied the particularized showing standard, *see* Brief in Opp. at 3—actually undermines that contention. After summarizing the Parnells' argument, the court simply concluded that "[t]he amounts and dates of the settlements would be *relevant* to this argument." Petition App. 3a (emphasis added). The Brief in Opposition also fails to quote from (or refer to) the subsequent paragraph, where the district court again used language straight out of Rule 26(b)(1). *Id.*

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[1] Although the Parnells imply that NPC relied only on Federal Rule of Evidence 408, *see* Brief in Opp. at 2, NPC's argument is based on numerous other authorities and important public policy concerns that support the particularized showing standard, *see* Petition at 18-21.

("the Court finds that the discovery of the settlement dates and amounts are [*sic*] *reasonably calculated to lead to admissible evidence*" (emphasis added)). The district court's order nowhere used the term "particularized showing" (or any comparable language), and there is no basis to conclude that it applied this standard.[2]

In sum, NPC's appeal to the Eleventh Circuit presented a pure question of law and argued that the district court erred in applying the liberal discovery standard of Rule 26(b)(1), instead of the particularized showing standard applied by most district courts, *see* Petition at 16 & n.7 (citing cases). As explained in NPC's Petition, which legal standard governs discovery requests for confidential settlement agreements from other lawsuits is a pure question of law that an appeals court would review de novo, without becoming enmeshed in a fact-intensive inquiry, and that should be resolved under the collateral order doctrine.

II. No Reported Federal Appellate Court Opinion Has Addressed The Precise Question Presented In NPC's Petition.

The Petition demonstrates that collateral order doctrine review of a pure question of law that is important and completely separate from the merits of the underlying lawsuit—here, the legal standard governing the discoverability of confidential settlements from other suits—should not be *per se* barred solely because the question arises in a discovery order. Attempting to portray the issue raised in the Petition as well-settled by "[a]ll of

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[2] The conclusion that the district court applied the Rule 26(b)(1) standard is also consistent with the Parnells' filings in support of their motion to compel, which relied on Rule 26(b)(1); argued that the settlement agreements are "relevant and reasonably calculated to produce admissible evidence"; and never contended that the Parnells had made a particularized showing of need for these documents. *See* Plaintiffs' Mem. of Law (served February 18, 1999) at 2; Plaintiffs' Mem. of Law (served May 12, 1999) at 1, 4.

the Circuits," Brief in Opp. at 4-5, the Parnells cite a string of ten reported opinions. But none of these cases addresses the question presented in NPC's Petition. Although the Parnells cite these cases for the proposition that discovery orders cannot be appealed under the collateral order doctrine even when they "require[] a party to disclose sensitive or confidential information such as settlement data," *id.* at 4, nine of the cases did not in any way involve settlement data. Moreover, the only opinion that involved a settlement-agreement-discovery order did not consider the pure question of law presented in NPC's appeal. *See Bacher v. Allstate Ins. Co.*, ___ F.3d ___, 2000 WL 424320, at *4 (3d Cir. Apr. 20, 2000) (declining to exercise collateral order doctrine jurisdiction and expressing doubt that doctrine's "separability" requirement is satisfied, because appellate review would necessarily require inquiry into whether settlement information at issue "is relevant to the merits of [the plaintiffs' claims]").

Nor has this Court resolved the question presented in the Petition. Two of the cases cited by the Parnells held that witnesses cannot immediately appeal the denial of a motion to quash a grand jury subpoena without first being held in contempt. *See* Brief in Opp. at 6 (citing *Cobbledick v. United States*, 309 U.S. 323 (1940); *United States v. Ryan*, 402 U.S. 530 (1971)). The *Cobbledick/Ryan* rule does not apply to this *civil* suit; the rule is based on the need to ensure the expeditious and effective administration of federal *criminal* proceedings, *see Cobbledick*, 309 U.S. at 324; *Ryan*, 402 U.S. at 533, and this Court has "interpreted the collateral order exception with the utmost strictness in criminal cases," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quotation marks omitted); *see Flanagan v. United States*, 465 U.S. 259, 265 (1984). An interlocutory appeal involving a grand jury subpoena also makes it difficult (if not impossible) for an appeals court to evaluate one of the essential collateral order doctrine requirements—that the appellate issue be separate from the merits of the underlying ac-

tion—because a grand jury subpoena involves secret, pre-indictment proceedings that occur before any "action" has been identified. *See In re: Grand Jury Subpoena*, 190 F.3d 375, 383-84 (5th Cir. 1999).[3]

Notwithstanding the Parnells' over-simplified and inaccurate summary of the contempt law applicable to this case, *see* Brief in Opp. at 5-6, the district court's order *is* effectively unreviewable on a later appeal, as required by the third prong of the collateral order doctrine, if NPC is barred from securing appellate review now. If NPC produces these confidential documents, no appeals court can cure the irreparable harm to NPC's legal interests. If NPC declines to produce the documents, there is little likelihood that it will have an effective appellate remedy, due to the confused and much-criticized state of contempt law and the uncertainty surrounding what kind of contempt citation (or other sanction) the district court may impose. *See* Petition at 22-23.

Under these circumstances, and in light of the benefits to numerous courts and litigants that would flow from federal appellate resolution of the important legal issue presented by NPC's appeal, *id.* at 12-16, a ruling by this Court directing the Eleventh Circuit to hear that appeal would be entirely consistent with the Court's collateral order doctrine jurisprudence. A ruling along these lines would not lead to a flood of interlocutory appeals of discovery orders because such orders rarely present important,

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[3] The Parnells' reliance on *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981), is also misplaced. The sentence quoted from that opinion, *see* Brief in Opp. at 6, is plainly dictum, because the *Firestone* Court held that the collateral order doctrine does not permit appeals from orders disqualifying counsel. In any event, the language from *Firestone* quoted by the Parnells is distinguishable for the same reasons discussed above in connection with *Cobbledick* and *Ryan*, which were the only two cases cited in this part of the *Firestone* opinion, 449 U.S. at 377. Nor does *Alexander v. United States*, 201 U.S. 117 (1906)—which was decided over forty years before *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)—resolve the collateral order doctrine question presented in NPC's Petition.

pure questions of law. *See id.* at 12-14 (discussing legal question/factual issue distinction and other "limiting principles" that would prevent most discovery orders from being appealed under the collateral order doctrine). Moreover, to be immediately appealable, a discovery order would have to resolve an issue "completely separate from the merits of the action," *Johnson v. Jones*, 515 U.S. 304, 310 (1995) (quotation marks omitted), which would ensure that—even when such appeals are heard—the vast majority of civil suits would continue proceeding towards trial without unduly delay.[4]

For the foregoing reasons and those set forth in the Petition, the Court should review the Eleventh Circuit's jurisdictional ruling in this case.

Respectfully submitted,

MICHAEL J. THOMAS
FULLER, JOHNSON & FARRELL
111 North Calhoun Street
Tallahassee, FL 32302
(850) 224-4663

JOE G. HOLLINGSWORTH
Counsel of Record
KATHARINE R. LATIMER
MARTIN C. CALHOUN
CYNTHIA L. KENDRICK
SPRIGGS & HOLLINGSWORTH
1350 I Street, NW
Ninth Floor
Washington, D.C. 20005
(202) 898-5800

Counsel for Petitioner

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[4] For example, the settlement-agreement-discovery order at issue in this case is so clearly collateral to the merits of the underlying claims and defenses that NPC's efforts to obtain appellate review of this narrow question have not prevented the parties from pursuing extensive discovery on other issues related to the merits—including whether the Parnells can meet the difficult burden of proving that NPC's product caused the injuries alleged in their complaint, based on scientifically reliable expert evidence that is admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny.